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JOSEPH F. SPANIOL, JR.  
CLERK

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No. 85-1716

In The  
**Supreme Court of the United States**  
October Term, 1985

— o —  
JEAN E. WELCH,

*Petitioner,*

v.

STATE DEPARTMENT OF HIGHWAYS AND  
PUBLIC TRANSPORTATION and  
THE STATE OF TEXAS,

*Respondents.*

— o —  
**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

— o —  
**JOINT APPENDIX**

— o —  
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Steinburg & Bryant  
1301 McKinney, Suite 3600  
Houston, Texas 77010  
(713) 654-7800  
*Counsel for Petitioner*

F. SCOTT McCOWN\*  
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Austin, Texas 78711  
(512) 463-2080  
*Counsel for Respondent*

\*Counsel of Record

**PETITION FOR CERTIORARI FILED APRIL 21, 1986  
CERTIORARI GRANTED OCTOBER 6, 1986**

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DOCKET ENTRIES

JEAN E. WELCH,

Plaintiff,

STATE DEPT. OF HIGHWAYS AND  
PUBLIC TRANSPORTATION, ET AL.,

Defendant.

Docket No. H 81-2593

DATE	NR.	PROCEEDINGS
10- 6-81	1	ORIGINAL COMPLAINT w/Jury DEMAND, filed.
10- 6-81		SUMMONS issued (4) on defts.
10-22-81	2	RETURN of Summons issued to The State of Texas served on 10-14-81, filed. dm
10-22-81	3	RETURN of Summons issued to The State Dept. of Highways and Public Transportation, served on 10-14-81, filed. dm.
10-22-81	4	RETURN of Summons issued to Drott Manufacturing Co., served on 10-15-81, filed. dm. Dd 10-22-81
10-28-81	5	RETURN of Summons issued to J.I. Case Co. served thru Michael D. Cucullu exec. on 10-9-81, filed. dm. DD 10-29-81
11- 2-81	6	ANSWER of Deft Drott Mnfg. Co., filed. dm DD 11-02-81
11- 6-81	7	Deft's MOTION to Dismiss, filed M/D Nov. 23, 1981 by clerk. DD 11-06-81
11-23-81	8	Pltf's MEMORANDUM IN OPPOSITION to Defts Motion to Dismiss, filed. dm DD 11-23-81
12-14-81	9	Pltf's MEMORANDUM OF LEGAL Authorities in support of defts' Motion to Dismiss, filed. dm
12-14-81	10	Deft's SUPPLEMENTAL MEMORANDUM in support of deft's Motion to Dismiss, filed. dm DD 12-15-81

## DATE NR. PROCEEDINGS

- 1-12-82 11 Deft's INTERROGATORIES under Rule 33 of F.R.C.P. to Pltf, filed. dm DD 1-13-82
- 1-29-82 12 Pltf Atty's NOTICE OF CHANGE of address, filed. dm DD 1-29-82
- 3- 1 82 13 (GEC) MEMORANDUM AND ORDER, filed. Parties ntfd. dm Motion to dismiss of defts the State of Texas and Texas Dept. of Highways and Public Transportation is GRANTED.
- 3- 9-82 14 (GEC) DOCKET CONTROL ORDER, filed. Parties ntfd. mc/dm
1. Motions Jul 23, 1982
  2. Pretrial/Settle. Conf. Aug. 30, 1982 3:00 p.m.
  3. Trial Term Sep./Oct. 1982
- 3- 9-82 15 Pltf's MOTION TO AMEND Order Dismissing State Dept. of Highways and Public Transportation and the State of Texas, filed. dm M/D Mar. 29, 1982 by clerk.
- 3-12-82 16 Pltf's ANSWER to Interrogatories, filed. dm
- 3-26-82 17 RESPONSE of defts, The State of Texas and its State Dept. of Highways and Public Transportation to Jean E. Welch, Pltf's Motion to amend order dismissing defts the State of Texas and its State Dept. of Highways & Public Trans., filed. dm
- 4- 8-82 18 Deft Drott Mngt's NOTICE OF DEPOSITION set for Dr. Craig R. Ponder to be taken 30 days from receipt of service, filed. dm
- 4- 8-82 19 Deft Drott Mnfg's NOTICE OF DEPOSITION set for University of Texas Medical Branch Hospital to be taken 30 days after receipt of service, filed. dm DD 4-8-82

## DATE NR. PROCEEDINGS

- 4-28-82 20 (GEC) ORDER, filed. Parties ntfd. dm
1. Pltf's motion to amend Court's order of 3-1-82 is DENIED. DD 4-28-82
- 4-29-82 21 DEPOSITION of Dr. R. Craig Ponder, filed. dm DD 5-6-82
- 6- 1-82 22 DEPOSITION of records from the University of Texas Medical Branch Hospital, filed. dm
- 7- 7-82 23 DEPOSITION of Jean Welch, filed. dm
- 8- 5-82 23A Pltf's MOTION FOR LEAVE to file Supplemental Complaint, filed. dm
- 8-10-82 24 Pltf's FIRST SET OF INTERROGATORIES to defts Drott Mnfg. Co., and JI Case Co., filed. dm
- 8-26-82 25 Deft's OBJECTIONS to Pltf's First Set of Interrogatories, filed. dm
- 8-26-82 26 JOINT MOTION f/CONTINUANCE, filed. dm
- 8-27-82 27 (GEC) ORDER, filed. Parties ntfd. dm
1. Pretrial Settlement Conf. Dec. 20, 1982 3:00 p.m.
  2. Trial Term f/case is reset to Jan./Feb. 1983
  3. Motion Deadline is Nov. 19, 1982.
  4. Pt. Conf. Dec. 20, 1982, 3:00 p.m.
- 9-16-82 28 Deft Drott Manf.'s ANSWERS to pltf's first set of interrog., filed. aa
- 10- 7-82 29 Pltf's NOTICE OF DEPOSITIONS of Manual Collado, Richard Rodriguez and Captain Uwells, on 10-19-82, filed. rj Dkt'd 10-12-82



## DATE NR. PROCEEDINGS

- 10-14-82 30 Defts' NOTICE OF DEPOSITIONS of Eugene A. McLendon and John Stephenson on 10-19-82, filed. rj Dkt'd 10-15-82
- 11- 1-82 31 Defts' RESPONSE to pltf's motion for leave to file supplemental comp., filed. aa Dtk'd 10-4-82
- 11-18-82 32 (GEC) ORDER filed. Parties ntfd. rj Dkt'd 11-19-82
- Pltf's Motion for Leave to File Supplemental Complaint is GRANTED; deft file responsive pleadings w/i 15 days of date of this order.
- 11-18-82 33 Pltf's FIRST SUPPLEMENTAL COMPLAINT, filed. (No New Parties) rj Dkt'd 11-19-82
- 11-19-82 DEPOSITIONS of the Following:
- 34 John Stephenson, filed.
- 35 Eugene McLendon, filed.
- 36 Richard Rodriguez, filed.
- 37 Manuel Collado, filed.
- 38 Robert F. Ewels, filed.
- 11-19-82 Pltf's NOTICE OF DEPOSITIONS of the Following:
- 39 Joseph Wirkus on 12-2-82, filed.
- 40 Donald Tucek on 12-2-82, filed.
- 41 Rogert Josiger on 12-3-82, filed.
- 42 Robert G. Christensen on 12-3-82, filed.
- 12- 3-82 43 Deft Drott Manufacturing Co.'s FIRST SUPPLEMENTAL ANSWER, filed. rj Dkt'd 12-7-82

## DATE NR. PROCEEDINGS

- 12-15-82 44 Pltf's MOTION FOR CONTINUANCE, filed rj (unopposed)
- 12-20-82 45 (GEC) ORDER, filed. Parties ntfd. rj
1. Pretrial conference scheduled 12-20-82, 3:00 p.m. continued to 2-28-83, 11:00 a.m.
  2. Trial reset for March, 1983.
- 1-28-83 (GEC) PRETRIAL CONFERENCE: (Tape No. 12B)
- Appearances: Pltf—Pearson  
Defts—Warren Taylor
1. Parties will not settle case
  2. Depositions of experts being taken this week
  3. Case stand-by Mar. 14; ETT 4-5 days. rj Dkt'd 3-4-83
- 1-28-83 46 PRETRIAL-ORDER, filed. rj
- A. Deft Drott Manufacturing & J. I. Case Co.'s Requested Jury Instructions and Interrogatories
  - B. Deft's Requested Voir Dire Questions Dkt'd 3-4-83
- 3-21-83 47 DEPOSITION of H. Boulter Kelsey, Jr., filed. rj
- 3-22-83 48 Pltf's REQUESTED SPECIAL INTERROGATORIES, filed. rj
- 3-22-83 49 Pltf's PROPOSED JURY INSTRUCTIONS, filed. rj
- 3-22-83 50 Defts' OBJECTIONS TO Pltf's Proposed Exhibits, filed. rj Dkt'd 3-23-83
- 3-22-83 51 Defts' MOTION TO DISMISS, filed. rj M/D April 11, 1983 by Clerk. Dkt'd 3-23-83

## DATE NR. PROCEEDINGS

- 3-24-83 52 Pltf's SUPPLEMENTAL NOTE OF EVIDENCE, filed. rj Dkt'd 3-25-83
- 3-24-83 53 Pltf's MOTION IN LIMINE, filed, rj Dkt'd 3-25-83
- 3-24-83 54 Pltf's MEMORANDUM in Opposition to Defts' Motion to Dismiss, filed. rj Dkt'd 3-25-83
- 3-28-83 55 (GEC) ORDER, filed. Parties ntfd. rj Defts' Motion to Dismiss—DENIED. Dkt'd 4-5-83
- 3-28-83 56 Deft J. I. Case's MOTION IN LIMINE, filed. rj Dkt'd 4-5-83
- 3-28-83 57 (GEC) 1st DAY JURY TRIAL, filed. (Rptr: Gary Bond)  
Appearances: Pltf—Cuculla  
Defts—Floyd  
Jury selected & sworn. Pltf evidence commenced. ADJOURNED, return 3-29-83. rj Dkt'd 4-5-83
- 3-29-83 58 (GEC) STIPULATION FOR JURY LESS THAN SIX BUT NOT LESS THAN FIVE, filed. rj Dkt'd 4-5-83
- 3-29-83 59 (GEC) 2nd DAY JURY TRIAL, filed. (Rptr: G. Bond)  
Appearances: Same as 1st Day.  
Pltf evidence cont'd. ADJOURNED, return 3-30-83, 9:00 a.m. rj Dkt'd 4-5-83
- 3-29-83 59 Deft J. I. Case Co.'s PROPOSED JURY INSTRUCTIONS, filed. rj Dkt'd 4-5-83
- 3-29-83 60 Deft J. I. Case Co.'s PROPOSED SPECIAL INSTRUCTIONS, filed. rj Dkt'd 4-5-83
- 3-30-83 61 (GEC) 3rd DAY JURY TRIAL, filed. (Rptr: G. Bond)  
Appearances: Same as 1st Day.  
Pltf evidence cont'd. Pltf rests. Deft Motion

## DATE NR. PROCEEDINGS

- f/Directed Verdict—DENIED. Deft evidence. Deft rests. Courts charge. Closing arguments. Jury out to deliberate 4:05.
- 3-30-83 63 Deft J. I. Case Co.'s MOTION FOR DIRECTED VERDICT, filed. DENIED. rj Dkt'd 4-5-83
- 3-30-83 64 Defts' REQUESTED JURY INSTRUCTIONS & INTERROGATORIES, filed rj Dkt'd 4-5-83
- \* \* \* \*
- 3-31-83 65 (GEC) 4th DAY JURY TRIAL, filed. (Rptr: G. Bond)  
Appearances: Same as first day.  
Verdict returned in favor of pltf. for \$110,000.  
ADJOURNED, mc rj Dkt'd 4-5-83
- 3-31-83 65 SPECIAL VERDICT FORM, filed. rj Dkt'd 4-5-83
- \* \* \*
- 3-30-83 66 (GEC) CHARGE TO THE JURY, filed. rj Dkt'd 4-5-83
- 3-31-83 67 LIST OF PLTFs' EXHIBITS, filed. rj Dkt'd 4-5-83
- 3-31-83 68 EXHIBIT LIST OF Deft Drott Manufacturing Co. & J. I. Case Co., filed. rj Dkt'd 4-5-83
- 4- 5-83 69 Pltf's RECEIPT FOR EXHIBITS, filed. rj Dkt'd 4-6-83
- \*4- 1-83 70 (GEC) FINAL JUDGMENT, filed. Parties ntfd. aa Dkt'd 4-6-83  
Pltf take \$191,387.00 from defts Drott Manuf. and J. I. Case Co. and costs of court are taxed to defts.
- 5- 2-83 71 Pltf's NOTICE OF APPEAL to Order entered March 1, 1982, filed. tf.  
Fees NOT paid. Rec'd & Dkt'd 5-3-83

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

CIVIL ACTION NUMBER H-81-233-2593

JEAN E. WELCH,  
Plaintiff,  
vs.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, A GOVERNMENTAL AGENCY OF THE STATE OF TEXAS, THE STATE OF TEXAS, DROTT MANUFACTURING COMPANY, A DIVISION OF J. I. CASE COMPANY, AND J. I. CASE COMPANY,

Defendants.

PLAINTIFF REQUESTS TRIAL BY JURY  
ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Jean E. Welch, a person of full legal age and a resident of Port Bolivar, Galveston County, Texas, complaining of the State Department of Highways and Public Transportation, a governmental agency of the State of Texas, the State of Texas, Drott Manufacturing Company, a division of J. I. Case Company, and J. I. Case Company for the following reasons, to-wit:

FIRST CAUSE OF ACTION

I

This is an action brought pursuant to Title 46, Section 688 of the United States Code, more commonly known as the Jones Act, for damages against the defendants, State Department of Highways and Public Transportation, a governmental agency of the State of Texas, and the State of Texas. This Honorable Court has jurisdiction of this

matter pursuant to Title 46, Section 688 of the United States Code.

II

The defendant, State Department of Highways and Public Transportation, is a governmental agency of the State of Texas and service of process may be made upon its Chairman, namely The Honorable A. Sam Waldrop, Highway Building, 11th and Brazos Street, Austin, Texas 78701.

III

The defendant, State of Texas, has an agent upon whom service of process may be made, namely The Honorable George W. Strake, Jr., Secretary of State, State Capitol Building, Austin, Texas 78701.

IV

On or about March 4, 1981, Jean E. Welch was employed by the State Department of Highways and Public Transportation and/or the State of Texas as a marine technician and by virtue of her duties was a seaman and a member of the crew of the vessels owned and operated by the defendant, State Department of Highways and Public Transportation or the State of Texas, which vessels provided ferry service from Galveston to Port Bolivar and therefore said vessels were engaged in navigation and commerce upon the navigable waters of the United States.

V

On or about March 4, 1981, the plaintiff was working in the course and scope of her employment for the defen-



dant State Department of Highways and Public Transportation or the State of Texas and was assigned duties which required her to assist in the loading of a barge over the side of a dock when suddenly and without warning the lifting device designed and manufactured by the defendant(s), Drott Manufacturing Company, a division of J. I. Case Company, and/or J. I. Case Company tipped over and crushed the plaintiff between the lifting device and the guard rail of the dock. As a result of being crushed between the lifting device and the guard rail, plaintiff sustained severe, permanent and disabling bodily injuries to her feet, ankles, legs, abdomen, lower back and internal organs. The injuries have required plaintiff to undergo extensive medical treatment, hospitalization and surgery and will require plaintiff to undergo further medical treatment, hospitalization and surgery in the future.

## VI

The injuries to the plaintiff were directly caused, in whole or in part, by the negligence of her employer, State Department of Highways and Public Transportation or the State of Texas, in the following respects:

- A. Defendant failed to furnish a safe place for plaintiff to perform her work;
- B. Defendant failed to furnish safe and proper equipment for plaintiff to perform her assigned tasks;
- C. Defendant's employee required plaintiff to stand in a position of danger between the lifting device and the guard rail in assisting in the operation of loading the barge into the water;

D. Defendant's employees failed to heed warnings concerning the maximum limitations of the lifting device;

E. Defendant's employees failed to use the "outriggers" attached to the lifting device as stabilization points before loading the barge into the water;

F. Defendant failed to furnish a qualified operator of the lifting device;

G. Defendant's employee was negligent by using the lifting device on a side load which exceeded the maximum limitations of the device;

H. Defendant's employee overextended the boom of the lifting device which caused it to tip over;

I. Defendant's employees failed to warn plaintiff of the imminent danger when the lifting device began turning over;

J. Defendant's employees were negligent by instructing your plaintiff to assist in the unloading of the barge into the water with her back to the lifting device.

## VII

That the said incident and resulting injury to the plaintiff was due solely and entirely to the negligence of the plaintiff's employer, State Department of Highways and Public Transportation or the State of Texas.

## SECOND CAUSE OF ACTION

And now plaintiff, Jean E. Welch, alleges a second cause of action against Drott Manufacturing Company, a division of J. I. Case Company, and J. I. Case Company for the following reasons, to-wit:



## VIII

Jurisdiction for the second cause of action is vested in this Honorable Court by reason of Title 28, Section 1332 of the United States Code in that plaintiff is a resident of the State of Texas and Drott Manufacturing Company, a division of J. I. Case Company, is a foreign corporation organized under the laws of the State of Delaware and not authorized or chartered to do business in the State of Texas. Therefore, service of process upon Drott Manufacturing Company may be effected by serving the Honorable George W. Strake, Jr., Secretary of State, State Capitol Building, Austin, Texas 78701.

J. I. Case Company is a foreign corporation organized under the laws of the State of Delaware, authorized and doing business in the State of Texas, and its agent for service of process is M. H. Covey, 29th Floor, Tenneco Building, 1010 Milam Street, Houston, Texas 77002.

Further, the matter in controversy exceeds the sum of TEN THOUSAND DOLLARS (\$10,000.00), exclusive of interest and costs.

## IX

Upon information and belief, plaintiff alleges that the mobile crane which caused her injury was designed, manufactured and sold by Drott Manufacturing Company, a division of J. I. Case Company and J. I. Case Company.

## X

On or about March 4, 1981, Jean E. Welch was employed as a marine technician by the State Department of Highways and Public Transportation, a governmental

agency of the State of Texas, or the State of Texas in Galveston, Galveston County, Texas.

## XI

On or about March 4, 1981, plaintiff was assigned duties which required her to assist in lifting a work barge from a dock into the water and the lifting device which was used to accomplish this task was a mobile crane designed and manufactured by the defendants, Drott Manufacturing Company, a division of J. I. Case Company, and J. I. Case Company. As plaintiff was performing the assigned task, the mobile crane designed and manufactured by the defendants tipped over and crushed plaintiff between the crane and the guard rail of the dock where she was standing. The crane in question which caused injury to the plaintiff was manufactured and sold by the defendants, Drott Manufacturing Company and J. I. Case Company and there were no substantial changes in its condition from the time of the sale of the crane until the time of the injury to the plaintiff. The plaintiff contends that the product was defective and unreasonably dangerous and not suited for its intended purposes and therefore defendant is strictly liable to the plaintiff under the applicable products liability law of this state.

## XII

Plaintiff further contends that the circumstances of her accident and resulting injuries could not have occurred without negligence on the part of the defendants, Drott Manufacturing Company and J. I. Case Company, and therefore, plaintiff pleads and relies herein on the doctrine of res ipsa loquitur.

## XIII

Alternatively, plaintiff contends that her injuries were proximately caused by the negligence of the defendants (said negligence creating causes of action under strict liability as well as under common law negligence principles) in the following respects:

A. Failing to design, manufacture and distribute a mobile crane which was fit for its intended purposes;

B. Failing to design, manufacture and distribute a crane which provided for maximum recommended lifts from its side as well as its front and rear;

C. Failing to design, manufacture and distribute a crane which was properly stable without the use of its "outriggers";

D. Failing to design, manufacture and distribute a crane which met the permissible load ratings of the Occupational Safety and Health Administration;

E. Failing to design, manufacture and distribute a crane which could lift its maximum recommended weight;

F. Failing to design, manufacture and distribute a crane which met other applicable Federal standards for safety;

G. Failing to sufficiently warn distributors, consumers and the general public regarding the safety hazards of overloading or exceeding the maximum recommended capacity;

H. Failing to sufficiently warn distributors, consumers and the general public of safety hazards in the event that the "outriggers" were not used for a side lift;

I. Failing to sufficiently warn distributors, consumers and the general public of safety hazards connected with a side lift as opposed to a front or rear lift;

J. Failing to sufficiently warn distributors, consumers and the general public of safety hazards of utilizing the crane for a side lift, whether the "outriggers" were down or not.

## XIV

As a direct and proximate result of the defective and dangerous conditions of the said crane, plaintiff sustained severe and permanently disabling bodily injuries to her feet, ankles, legs, abdomen, lower back and internal organs. The injuries have required plaintiff to undergo extensive medical treatment, hospitalization and surgery and will require plaintiff to undergo medical treatment, hospitalization and surgery in the future. Further, plaintiff has been caused to lose wages in the past and as a result of her injuries will be caused to lose wages in the future and her wage earning capacity has been severely and permanently impaired. As a result of her injuries, plaintiff has suffered severe pain, anguish and anxiety and will continue to suffer pain, anguish and anxiety for the remainder of her life.

## XV

As a result of the injuries to the plaintiff, she has incurred medical and hospital expenses in excess of FIFTY THOUSAND DOLLARS (\$50,000.00) at the present time and will in the future incur additional medical, hospital and surgical expenses, the exact amount of which cannot be determined at the present time, but plaintiff reason-

ably anticipates that they will be in excess of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00).

WHEREFORE, plaintiff Jean E. Welch prays that the defendants be cited to appear and answer and that after due proceedings that there be judgment rendered herein in favor of your plaintiff, Jean E. Welch, and against the defendants, State Department of Highways and Public Transportation, a governmental agency of the State of Texas, the State of Texas, Drott Manufacturing Company, a division of J. I. Case Company, and J. I. Case Company, for the full and true sum of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS (\$2,500,000.00), together with legal interest thereon as provided by law and for all costs of this proceeding and for any and all relief at law or in equity to which the plaintiff, Jean E. Welch, may show herself justly entitled.

Respectfully submitted,

/s/ Michael D. Cucullu  
Bar No. 05201600  
Two Houston Center  
Suite 1016  
Houston, Texas 77010  
(713) 654-1669  
Attorney for Plaintiff,  
Jean E. Welch

PLEASE SERVE:

State Department of Highways  
and Public Transportation,  
through its Chairman,  
Honorable A. Sam Waldrop  
Highway Building  
11th and Brazos Streets  
Austin, Texas 78701

State of Texas,  
through its Secretary of State,  
Honorable George W. Strake, Jr.  
State Capitol Building  
Austin, Texas 78701

Drott Manufacturing Company,  
a division of J. I. Case Company,  
through the Secretary of State,  
Honorable George W. Strake, Jr.  
State Capitol Building  
Austin, Texas 78701

J. I. Case Company,  
through its registered agent,  
M. H. Covey  
29th Floor, Tenneco Building  
1010 Milam Street  
Houston, Texas 77002

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION  
CIVIL ACTION NUMBER HS1-2593

JEAN E. WELCH,  
Plaintiff,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, A GOVERNMENTAL AGENCY OF THE STATE OF TEXAS, THE STATE OF TEXAS, DROTT MANUFACTURING COMPANY, A DIVISION OF J. I. CASE COMPANY, AND J.I. CASE COMPANY,

Defendants.

PLAINTIFF REQUESTS TRIAL BY JURY  
MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW State Department of Highways and Public Transportation, a governmental agency of the State of Texas, and the State of Texas, both so named among the Defendants in the Plaintiff's Original Complaint, represented herein by the Attorney General of Texas and move the Court under Rule 12(b) of the Federal Rules of Civil Procedure as follows:

I

To dismiss this action as to State Department of Highways and Public Transportation and the State of Texas on the grounds of the immunity afforded in Federal Courts to both the State of Texas and its Department of Highways and Public Transportation under the Eleventh Amendment to the Constitution of the United States. This immunity has not been waived.

II

To dismiss this action as to the State of Texas and its Department of Highways and Public Transportation because the Complaint fails to state a claim against the State or its Department of Highways and Public Transportation upon which relief can be granted for the following reasons:

The First cause of action of Plaintiff's Original Complaint seeks a money judgment in this honorable court under the jurisdiction of Title 46, Section 688 of the United States Code, commonly known as the Jones Act against the State of Texas and its Department of Highways and Public Transportation for damages for Plaintiff's injuries as an employee, caused by negligence of Plaintiff's employer, the State of Texas or its Department of Highways and Public Transportation.

Both the State of Texas and its Department of Highways and Public Transportation have immunity from suit by State employees without consent of the State and, unless waived, immunity from liability in Tort. Consent to suit has not been given and immunity from Tort liability in the action Plaintiff brought has not been waived.

WHEREFORE, PREMISES CONSIDERED, Defendants, the State of Texas and its Department of Highways and Public Transportation pray that this Motion be set for hearing, that upon such hearing the Court order that this action, as to the State of Texas and the State Department of Highways and Public Transportation, be dismissed, adjudging all costs herein against the Plaintiff.



Respectfully submitted,  
 MARK WHITE  
 Attorney General of Texas  
 /s/ Joe D. Jarrard, Jr.  
 Assistant Attorney General  
 P.O. Box 5075  
 Austin, Texas 78763  
 (512) 475-8473  
 Bar Card No. 10580000

### CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing Motion as well as the accompanying proposed order have been deposited this date in the United States Mail, Certified Mail, Return Receipt Requested, address to Michael D. Cucullu, Plaintiff's attorney, Two Houston Centre, Suite 1016, Houston, Texas 77010.

SIGNED November 4th, 1981.

/s/ Joe D. Jarrard, Jr.  
 Assistant Attorney General

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### IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C. A. NO. H-81-2593

JEAN E. WELCH,

vs.

STATE DEPARTMENT OF HIGHWAYS AND  
 PUBLIC TRANSPORTATION, ET AL.

MEMORANDUM AND ORDER  
 (Filed March 1, 1982)

Before the Court is a motion to dismiss filed by Defendants the State of Texas and its State Department of Highways and Public Transportation. For the reasons indicated below, the Court is of the opinion that this motion should be GRANTED. The Court therefore ORDERS that the Jones Act claims of Plaintiff against the State of Texas and its Department of Highways and Public Transportation are DISMISSED with prejudice.

Plaintiff brought this suit in admiralty against the State of Texas and its State Department of Highways and Public Transportation (DHPT) pursuant to the Jones Act, 46 U.S.C. § 688, and against two private companies pursuant to common law negligence and strict liability. Plaintiff alleges in her complaint that she was employed as a seaman by the DHPT or the State when she was crushed between a mobile crane and the dock where she was standing in the course and scope of her employment as a marine technician on or about March 4, 1981.

The State and the DHPT have filed a motion to dismiss for want of subject matter jurisdiction claiming the protections of the eleventh amendment and the doctrines

of sovereign immunity and governmental immunity in tort. Plaintiff responded to this motion by arguing that the Defendants waived these defenses to suit by operating a ferry service in commerce over navigable waters, which is within a federally regulated sphere of activity. The State and the DHPT contend, however, that they have neither expressly nor impliedly consented to suit and, further, that the exclusive remedy provision of the workers' compensation statute precludes suit under the Jones Act.

The eleventh amendment provides that states may not be sued in federal courts by citizens of another state or citizens or subjects of a foreign state. U.S. CONST. amend. XI. This protection from suit has been construed to preclude as well a suit against a state by a citizen of that state. *Great Northern Life Ins. Co. v. Read*, 332 U.S. 47, 64 S. Ct. 873 (1944); *Hans v. Louisiana*, 134 U.S. 1 (1890). The eleventh amendment immunity also clearly encompasses suits in admiralty. *Ex Parte State of New York*, 256 U.S. 490 (1920); *Mifsud v. Palisades Geophysical Institute, Inc.*, 484 F. Supp. 159 (S.D. Tex. 1980).

The Fifth Circuit addressed the status of eleventh amendment immunity most recently in *Karpovs v. Mississippi*, 663 F.2d 640 (5th Cir. 1981) and explained several principles that the Court finds directly relevant to this action:

[As] a general matter suits against the state for prospective injunctive relief are permitted in limited circumstances, *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), but suits against the state treasury are absolutely barred. *Edelman v. Jordan* [415 U.S. 651, 94 S. Ct. 1347 (1974)]. . . . [This] immu-

nity extends beyond the state and encompasses state agencies, officials and employees "when the action is in essence one for the recovery of money from the state . . . ." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S. Ct. 347, 350, 89 L. Ed. 389 (1945). In such cases, "the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*; *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 66 S. Ct. 745, 90 L. Ed. 862 (1946). [Finally], the eleventh amendment applies unless a federally created right is at issue, or a state has either consented to suit in federal court or has waived its eleventh amendment shield. *Parde v. Terminal Railroad Co.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed.2d 233 (1964).

*Id.* at 643-44 (footnote omitted). Because Plaintiff seeks a monetary recovery that would be paid from the state treasury, *Karpovs* definitively precludes Plaintiff's argument that even if the State were entitled to assert eleventh amendment immunity, the DHPT would not be similarly protected.

Plaintiff's opposition to this motion to dismiss relies heavily on the Supreme Court's *Parde* decision. In *Parde*, the Supreme Court found that a state could waive its eleventh amendment immunity by merely operating within a federally regulated sphere. Although the federally regulated sphere in *Parde* was interstate railroads, lower courts later used the *Parde* reasoning to find that a state waived its immunity to the Jones Act by operating within the federally regulated maritime sphere. *Rivet v. East Point Marine Corp.*, 325 F. Supp. 1265, 1267 (S.D. Ala. 1971), *ovr'd*, *Benniefield v. Valley Barge Lines*, 472 F. Supp. 314, 317 (S.D. Ala. 1979); *Huckins v. Board of*

*Regents of the University of Michigan*, 263 F. Supp. 622, 623 (E.D. Mich. 1967); *Cocherl v. Alaska*, 246 F. Supp. 328, 330 (D. Alaska 1965).

Subsequent to these decisions, however, the Supreme Court decided *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 93 S. Ct. 1614 (1973). In *Employees*, the Court refused to extend *Parden* to cover every piece of legislation passed by Congress pursuant to its commerce power. Rather, *Employees* added an additional requirement to the *Parden* test for determining whether a state has implicitly waived its eleventh amendment immunity by operating within a federally regulated sphere: the private litigant must show that Congress expressly provided that the private remedy would be applicable to the States. 411 U.S. at 286, 93 S. Ct. at 1619.

Later that same year, the Fifth Circuit applied this new test to a suit brought under the Bridge Act of 1906, 33 U.S.C. § 491, and found that eleventh amendment immunity afforded the state agency being sued a complete defense. *Intracoastal Transportation, Inc. v. Decatur County, Georgia*, 482 F.2d 361 (5th Cir. 1973). This reasoning was followed by the Fifth Circuit in 1981 when it reaffirmed its interpretation of the Bridge Act of 1906 and extended its decision to find no implicit waiver of sovereign immunity when the cause of action was alternatively brought pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401. *Freimanis v. Sea-Land Service, Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981). The Fifth Circuit's decision in *Karpovs, supra*, was another reaffirmation that these two pieces of federal

legislation did not implicitly waive the states' eleventh amendment immunity.

*Freimanis* relied to a great extent on the Supreme Court's latest pronouncement on whether a state can implicitly waive its eleventh amendment immunity. In *Quern v. Jordan*, 440 U.S. 332, 345, 99 S. Ct. 1139, 1147 (1979), the Court held that the Civil Rights Act of 1871, 42 U.S.C. § 1983, did not abrogate the eleventh amendment immunity of the states. While distinguishing other cases where this immunity was held to be waived, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666 (1976) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e) and *Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2482 (1978) (Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988), the Supreme Court noted that section 1983 neither explicitly swept away the states' eleventh amendment immunity nor had a history that focused directly on the question of state liability and demonstrated a clear Congressional decision to abrogate that immunity. 440 U.S. at 345, 99 S. Ct. at 1147.

The wording of the Jones Act itself does not include an express decision by Congress to abrogate the eleventh amendment immunity of the states and Plaintiff has not demonstrated through the legislative history of this statute that Congress had a specific intent to allow private parties to bring suit against a state. The Court therefore finds that neither the State nor the DHPT have implicitly waived their eleventh immunity by operating within a sphere arguably covered by the Jones Act.

Plaintiff argues alternatively that the State has expressly consented to be sued and has thus waived its elev-



enth amendment protection. The Texas Torts Claims Act allows suit against the State for personal injuries proximately caused by the negligence of any officer or employee acting within the scope of employment if the injury arose from "the operation or use of a motor driven vehicle and motor driven equipment." TEX. REV. CIV. STAT. ANN. art. 6252-19 § 3 (Vernon Supp. 1980-81). Section 4 of the Texas Torts Claims Act specifically waives the State's immunity from suit to the extent of the "liability created by Section 3" and grants permission to all claimants to sue the State of Texas for "all claims arising" under the Act. TEX. REV. CIV. STAT. ANN. art. 6252-19 § 4 (Vernon 1970).

The State of Texas then attempts to limit this waiver of immunity in section 19 of the Act, which provides that a governmental unit carrying worker's compensation is entitled to the privileges and immunities granted by the Workers' Compensation Act. The DHPT carries worker's (sic) compensation insurance, under a statute specifically providing for such. TEX. REV. CIV. STAT. ANN. art. 6674s (Vernon 1977). Section 3 of this statute limits employees to this exclusive remedy for injuries sustained while working within the course of their employment.

Plaintiff argues that the exclusive remedy provision in the workers' compensation statute cannot preclude her recovery under the Jones Act and bases this argument on *Roberts v. City of Plantation*, 558 F.2d 750 (5th Cir. 1977). In *Roberts*, the Fifth Circuit held that if the plaintiff could prove himself entitled to Jones Act recovery, the exclusive remedy provisions of Florida's workers' compensation statutes could not oust the federal court

of its jurisdiction. Similarly, the Fifth Circuit held in *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2820 (1979), that the Louisiana statute providing that workers' compensation would be the exclusive remedy for an injured oil field maintenance and construction worker could not result in a dismissal of a Jones Act suit. *See also Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980).

In neither *Roberts* nor *Thibodaux*, however, could the defendants assert an eleventh amendment immunity defense. These cases are therefore clearly distinguishable from the present action. A state is entitled to eleventh amendment immunity from the Jones Act and thus may be sued only with its consent, unlike a private defendant. Although Texas chose to waive its immunity through the Texas Tort Claims Act, it expressly limited that waiver when workers' compensation coverage is provided.

The Court therefore finds that the exclusive remedy provision in the workers' compensation statute for employees of the DHPT also precludes Plaintiff's Jones Act suit against her employer and the State of Texas. *See Mifsud v. Pal ides Geophysical Institute, Inc.*, 484 F. Supp. 159 (S.D. Tex. 1980); *Lyons v. Texas A&M University*, 545 S.W.2d 56 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

In conclusion, the State and DHPT are protected from Plaintiff's Jones Act claim against them in this Court by operation of eleventh amendment immunity. The Court therefore finds it unnecessary to address Defendant's alternative theories under the separate doctrines



of sovereign immunity and governmental immunity in tort.

The motion to dismiss of Defendants the State of Texas and the Texas Department of Highways and Public Transportation is hereby GRANTED.

SIGNED and ENTERED this 1st day of March 1982.

/s/ George E. Cire  
UNITED STATES  
DISTRICT JUDGE